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506-814—73——1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1495

YALE BROADCASTING COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a–26a) and the *per curiam* order of that court denying rehearing *en banc* (Pet. App. 1a–9a) are not yet reported. The orders of the Federal Communications Commission (Pet. App. 39a–47a, 33a–38a, and 27a–32a) are reported at 28 F.C.C. 2d 409, 31 F.C.C. 2d 377, and 31 F.C.C. 2d 385.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1973. The Chief Justice extended the

time within which to file a petition for a writ of certiorari to and including May 4, 1973, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is consistent with the First Amendment for the Federal Communications Commission to remind broadcasters that their public interest responsibility to know what is broadcast over their own stations includes making reasonable efforts to determine whether recorded songs promote the illegal use of drugs, and thus to make an informed judgment concerning the wisdom of broadcasting such records.

2. Whether the Federal Communications Commission properly exercised its discretion in refusing to issue a declaratory ruling on whether a particular broadcaster's operating plans would conform to the Commission's policy requiring reasonable attention by licensees to the lyrics of records they broadcast.

STATEMENT

After receiving numerous complaints concerning broadcasts of recorded songs which allegedly promoted the use of illegal drugs, the Federal Communications Commission, on March 5, 1971, issued a Public Notice (Pet. App. 39a–47a) dealing with this subject. The notice was intended to remind broadcasters of their long-established responsibility "to have knowledge of the content of their programming and on the basis of this knowledge to evaluate the desirability of broadcasting music dealing with drug use" (Pet. App. 11a).

Requests for reconsideration filed by several parties, including petitioners, indicated that some persons in the broadcasting industry had interpreted the Public Notice as a directive not to play certain types of records. To correct this misunderstanding, the Commission on April 16, 1971, adopted a Memorandum Opinion and Order giving a "definitive statement" of its position (Pet. App. 33a–38a). The thrust of the April 16 Order was that: "(1) the Commission was not prohibiting the playing of 'drug oriented' records, (2) no reprisals would be taken against stations that played 'drug oriented' music, but (3) it was still necessary for a station to 'know' the content of records played and make a 'judgment' regarding the wisdom of playing such records" (Pet. App. 12a).

While the Commission expected licensees to know what they played over the air, it did not require extensive investigation of each record, nor did it expect broadcasters to decipher every syllable or to resolve every ambiguity prior to broadcast; and it did not establish any general requirement to pre-screen records (Pet. App. 14a). Solely by way of suggestion, it did identify some procedures a broadcaster might follow: (1) pre-screening by a responsible station employee, (2) monitoring selections while they were being played, or (3) considering and responding to complaints made by members of the public (Pet. App. 36a; 15a). Ultimately, however, the Commission required "reasonable, good faith action by the public trustee to whom the frequency has been licensed. No more, but certainly no less is called for" (Pet. App. 36a).

Petitioners then sought reconsideration, and petitioner Yale Broadcasting additionally requested a declaratory ruling on the adequacy of its proposed policy statement on the broadcasting of musical records (see Pet. App. 30a–32a). The Commission denied reconsideration on the ground that its April 16 Order was clear and definitive (Pet. App. 27a). It declined to rule on the validity of Yale's proposed policy because it was presented in the abstract without having been "fleshed out by the licensee's actual operation" (Pet. App. 28a).

On petition for review, the court of appeals unanimously affirmed (Pet. App. 10a–26a). Viewing the April 16 Order as having superseded the earlier policy statement (Pet. App. 13a), the court found that the Commission's action was a reminder to licensees that in the performance of their obligation to broadcast in the public interest they should appraise the potential impact of drug-oriented lyrics, and that the order embodied the "common-sense observation that in order to make this considered judgment a broadcaster must 'know' what it is broadcasting" (*ibid.*). This reminder, it noted, was consistent with long-standing Commission policy that licensees are responsible for what they broadcast (Pet. App. 20a–21a). The court rejected, on two grounds, petitioners' argument that the Commission's order is inconsistent with *Smith* v. *California*, 361 U.S. 147. First, the burden placed on licensees here is far less onerous than that placed on booksellers in *Smith*. Second, in order for

a licensee to know whether it is broadcasting in the public interest, "knowledge of its own programming is required" (Pet. App. 17a).

The court also upheld the Commission's refusal to issue a declaratory ruling on Yale Broadcasting's proposed policy. It held that the issuance of such a ruling was in the agency's discretion, and that it had not abused that discretion in refusing to rule in the abstract on a station's operating methods where it reasonably concluded "that it had said enough and that the rest was up to the 'licensee's individual responsibility for programming'" (Pet. App. 25a).

Petitioners did not seek rehearing. However, a motion for rehearing *en banc* was initiated by a member of the full court and was denied with one dissent (Pet. App. 1a).

ARGUMENT

This case presents no issue warranting review by this Court. The Commission's Orders, unanimously affirmed by the court of appeals, are no more than a restatement of the well-settled principle that a broadcast licensee in the discharge of its obligation to operate in the public interest has the responsibility to know the content of its programming. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, No. 71-863, decided May 29, 1973.

1. The Commission's Order reminds licensees of

their established obligation to know what they broadcast.[1] As the court of appeals stated (Pet. App. 13a):

> The Order recognizes the gravity of the drug abuse problem in our society. From this basis, the Order proceeds to remind broadcasters that they may not remain indifferent to this severe problem and must consider the impact that drug oriented music may have on the audience. The Commission then makes the common sense observation that in order to make this considered judgment a broadcaster must "know" what it is broadcasting.

Thirty years ago this Court sustained the Commission's view that a broadcast license to operate on the public airwaves imposes a responsibility upon the licensee to know the content of its own programming and to determine whether that programming serves the needs and interests of its community. *National Broadcasting Co.* v. *United States*, 319 U.S. 190. In that case the Court affirmed the Commission's chain broadcast-

[1] See, *e.g.*, the Commission's 1960 *Programming Policy Statement*, which the court below characterized as the "most thorough articulation of this duty" (Pet. App. 20a):

"Broadcast licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. * * * This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast material for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community." (Pet. App. 20a, quoting from Commission's *en banc*, *Network Programming Inquiry —, Report and Statement of Policy*, 25 Fed. Reg. 7291, 7295 (1960)).

ing regulation designed to insure that licensees have the practical opportunity to reject network programs.[2] The premise of that regulation, affirmed by this Court, was that:

> "[A] licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory." [319 U.S. at 206.]

Just as a licensee cannot fulfill its duties by simply accepting network programming without any knowledge of its contents, here the Commission and the court of appeals concluded that a broadcaster does not meet its responsibilities by simply broadcasting recorded songs without knowing, before, during, or after their broadcast, whether such programming constitutes a service or disservice to the public.

In *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, this Court observed that broadcasters, as trustees of a scarce and valuable national resource, have an affirmative obligation to make informed programming decisions. Broadcast licensees also have an affirmative duty to select program material which will provide their communities with suitable access to "social, political, esthetic, moral, and other ideas and experiences" (395 U.S. at 390). And only last month this Court

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[2] The Commission has adhered to the principle articulated in its chain broadcasting regulation. See, *e.g.*, *Programming Policy Statement*, 25 Fed. Reg. 7291, 7295 (1960).

reaffirmed the importance of licensee responsibility in administering the Fairness Doctrine. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, No. 71–863, decided May 29, 1973, slip op., pp. 15–16, 35–36.

Petitioners' reliance on *Smith* v. *California*, 361 U.S. 147, is misplaced. First, as the court of appeals observed (Pet. App. 16a–17a), there are obvious differences between a bookseller offering thousands of volumes to purchasers for their selection, and a broadcaster selecting particular items to be broadcast to thousands of listeners. Second, in contrast to *Smith*, the effect of the Commission's long-established policy is not to halt or impede dissemination of information. As the court of appeals stated (Pet. App. 17a): "Here the [Commission's] goal is to assure the broadcaster has adequate knowledge. Knowledge is required in order that the broadcaster can make a judgment about the wisdom of its programming. * * * [I]n order to make a judgment about the value of programming one must have knowledge of that programming." The Commission's policy is thus designed to assure that information disseminated over limited public airwaves serves the objectives set forth in *Red Lion* and in the Commission's 1960 *Programming Policy Statement* (quoted in note 1, *supra*). See also *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra*. Thus, regardless of whether *Smith* reaches beyond bulk retailers of printed matter, it does not apply to a broadcaster's duty to know what he selects for broadcast.

Petitioners argue that the Commission censored or attempted to ban the broadcasting of certain material. But the Commission's "definitive" Order of April 16 stated in clear and unequivocal terms (Pet. App. 34a):

> [N]othing in the prior Notice stated, directly or indirectly, that a licensee is barred from presenting a particular type of record. On the contrary, the Notice made clear that selection of records was a matter for the licensee's judgment. * * *

The Commission emphasized that individual judgments by licensees are not reviewable at renewal time, since "our function is solely limited to a review of whether a licensee's programming efforts, on an overall basis, have been in the public interest" (Pet. App. 34a).

The court below thus correctly found that the Order did not ban any types of songs but simply reminded licensees of their fundamental duty to consider whether the programming they are broadcasting will serve the public interest (Pet. App. 13a).[5]

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[5] Contrary to petitioners' suggestion (Pet. 16), the doctrine of licensee responsibility as enunciated by the Commission here is fully compatible with *Anti-Defamation League of B'Nai B'rith* v. *Federal Communications Commission*, 403 F. 2d 169 (C.A.D.C.), certiorari denied, 394 U.S. 930. In *B'Nai B'rith* the Commission granted renewal of a license in the face of a contention that renewal should be denied because the licensee had broadcast anti-Semitic remarks. The court of appeals upheld the Commission's ruling that the First Amendment and Section 326 of the Communications Act prohibited such censorship, and that in these circumstances the complainant's talk

2. The court of appeals' affirmance of the Commission's refusal to issue a declaratory ruling on Yale Broadcasting's proposed policy statement does not, as petitioners contend (Pet. 17–22), conflict with *New York State Broadcasters Ass'n* v. *United States*, 414 F. 2d 990 (C.A. 2), certiorari denied, 396 U.S. 1061. Section 5(d) of the Administrative Procedure Act (5 U.S.C. 554(e)) leaves the issuance of declaratory orders to the "sound discretion" of the agency. The court of appeals held that, because Yale Broadcasting's proposed statement was presented in the abstract, the Commission's refusal to rule on it was not an abuse of that discretion (Pet. App. 25a).

Petitioners apparently do not deny that the proposed policy statement was indeed presented in the abstract, but they urge that "[t]he controlling facts in the Second Circuit's opinion are virtually identical to those in the Court's opinion below" (Pet. 19). This contention overlooks important distinctions between the cases. In *New York State* the Second Circuit directed the Commission to issue declaratory rulings concerning licensees' obligations under the lottery statute (18 U.S.C. 1304), which imposes criminal sanctions. Issuance of such general guidelines by the Commission was necessary because "[t]here have apparently never been any prosecutions for violations of section 1304, and we find no other judicial opinions explicitly

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of licensee responsibility was only a euphemism for censorship. In the present case, the Commission engaged in no censorship, direct or indirect, and, faithful to the principles stated in *B'Nai B'rith*, made it clear that any such action would be unlawful (Pet. App. 34a–35a).

interpreting the 'information concerning' language of the statute" (414 F. 2d at 997–998). Here, on the other hand, in a non-criminal context, the applicable orders reiterated long-standing Commission policy and set forth three specific and non-exclusive methods of meeting licensee responsibilities.

Whether it is an abuse of discretion to refuse to issue a declaratory ruling necessarily turns on the particular facts of each case. The court of appeals was correct in holding that there was no such abuse here, and its resolution of this essentially factual issue does not warrant further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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